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# Preserving the Nondutiable Character of Overseas Buying Agent Commissions for United States Importations**

In today's complex world of diverse cultures and customs, many United States importers are finding the services of an overseas-based agent to be indispensable. These agents perform crucial sourcing, liaison, and inspection services for the importer in procuring the desired merchandise abroad. In return for the services of the overseas agent, the importer most often pays a commission based on a percentage of the value of the procured goods.[1]

The question of whether the commission payments to the agent will become a part of the dutiable value of the merchandise upon entry in the United States will have a direct impact on the importer's profit margin. Cost predictions are uncertain because the United States Customs Service may attempt to add otherwise excludable bona fide buying agent commissions to the dutiable value of the imported goods. Such an addition increases the assessed duty, and therefore, the cost of the goods. The cumulative effects of dutiable agent commissions can be discouraging to importers in all cases and even devastating in transactions involving so-called "column two" countries that have not been accorded the relatively low duty rates of the most favored nation "column one" countries.[2]

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**The Editorial Reviewer for this article was Wade Channell.

1. A 5 to 7 percent commission is considered the norm in the trade. C.S.D. 89-30, Nov. 1, 1988, 23 Cust. B. & Dec. (No. 13) 18 (Mar. 29, 1989).

2. "Column one" and "column two" are part of the former Tariff Schedules of the United States and since January 1, 1989, the Harmonized Tariff Schedules of the United States. *See* 19 U.S.C. § 1202 (1988). The countries not accorded most favored nation status and whose goods come under "column two" are: Afghanistan, Albania, Bulgaria, Cuba, Czechoslovakia, Estonia, German Democratic Republic, Kampuchea, Laos, Latvia, Lithuania, Mongolia, North Korea, Romania, Union of Soviet Socialist Republics, and Vietnam. *See* General Headnote 3(b) to the Harmonized Tariff Schedules. [Because of recent changes in world politics, this list is likely to grow smaller in the near future. The German Democratic Republic and the Union of Soviet Socialist Republics are most likely to be the first taken from the list.]

## I. Background

The key to ensuring that agent commissions are not added to dutiable value is the ability to evidence their origin from a bona fide buying agent, as opposed to a selling agent, and to show that no portion of the commission has inured to the benefit of the foreign seller. In brief, a buying agent acts at the direction, and for the account, of the U.S. importer, whereas a selling agent acts at the direction, and for the account, of the foreign exporter. The importance of this distinction between buying and selling agents arises from the GATT Valuation Code (Article VII, Tokyo Round, 1979), the relevant part of which is codified at 19 U.S.C. § 1401a (1988).

Specifically, among the items of the section 1401a(b) laundry list that must be added to the price actually paid or payable as part of dutiable value, only *selling* commissions are listed, not *buying* commissions. Section 1401a(b)(1) expressly states that only those amounts enumerated, and no others, will be added to the price actually paid or payable. Because buying commissions are not enumerated, and thus are not includable in dutiable value, the importer has a great incentive to ensure that the activities of the involved agent comport with those of a bona fide buying agent as defined by the courts.

The following is a brief review of the main issues considered by the United States Court of International Trade in assessing whether a bona fide buying agent is on hand in a given case. It is hoped that this review will assist those representing importers to discover potential problems in this area before they become irreparable. With the U.S. Customs Service's ever-increasing vigilance, the mere presentation of an invoice or other documentation from the actual foreign seller, as well as a written buying agency agreement, will prove insufficient in highly scrutinized cases. As seen below, steps must be taken to ensure that the totality of the evidence demonstrates that the purported agent is in fact a bona fide buying agent and not a selling agent or an independent seller.[3]

A reading of the relevant cases quickly reveals that the characterization of an agent as either a buying or a selling agent is a question resolved by agency law principles. Because of the vagaries of applying agency law principles to differing factual circumstances, disputes regarding whether a bona fide buying agent is at hand in a given case have frequently been the subject of litigation before the United States Court of International Trade (CIT), as well as the Court of Appeals for the Federal Circuit (CAFC). Unfortunately, because the courts must apply those agency principles on a case-by-case basis, the cases involving the existence of a bona fide buying agent do not readily lend themselves to constructive analysis with a view to predicting the legal consequences of specific actions.

3. General Notice: Buying Agency Commissions, Feb. 1, 1989, 23 Cust. B. & Dec. (No. 11) 9, 10 (Mar. 15, 1989).

## II. The State of Case Law on the Bona Fide Buying Agent

Despite the difficulties of meaningful application of agency law standards, a general pattern of analysis by the CIT in this area can be discerned. From a foothold presumption of correctness in favor of the government's appraisal of dutiable value, the CIT will analyze these factors in the following order of importance:

(1) the amount of control the buyer/importer exerts over the purported buying agent (in other words, the relationship in substance);
(2) the manner of payment (for example, as seen below, payment of the agent via the foreign seller/manufacturer, notwithstanding requisite attributes of control, can prove fatal to nondutiable character because of the wording of 19 U.S.C. § 1401a (1988));
(3) the risk of loss allocation (for example, as discussed below, again notwithstanding other requisite attributes of control, an agent who must bear the risk of loss or who maintains its own inventories will be found to be acting for its own account as if the agent were an independent seller); and
(4) the transaction documents (in other words, the relationship in form).

As seen below, the most important criterion is the substance of the importer's relationship with the agent, not the existence or nonexistence of documentation. This subjective criterion is what makes this area such a potential problem, especially when subject to close U.S. Customs Service inquiry.

Where justified on a cost-benefit basis, and when a proposed transaction appears even slightly questionable in view of the case law analysis below, the importer should be advised to avail itself of the prospective administrative ruling request procedures.[4] The importer can thereby obtain a private ruling letter from, and that is binding on, the U.S. Customs Service respecting the specific factual circumstances of the proposed import/agency transaction. For transactions already in progress, the importer should be advised to consider availing itself of the administrative prior disclosure procedures.[5] Problems arise particularly when importers have failed to declare the existence of commission payments, even though required to do so by law.[6] A properly constructed prior disclosure can prevent the potential assessment of harsh penalties under 19 U.S.C. § 1592 (1988).

### A. The Presumption of Correctness

*J.C. Penney Purchasing Corp. v. United States*[7] is the most frequently cited

4. *See* 19 C.F.R. pt. 177 (1989), which provides a procedure for obtaining a binding Customs ruling on prospective transactions.
5. 19 C.F.R. § 162.74 (1989).
6. *See* 19 U.S.C. § 1481(a)(8) (1988).
7. 80 Cust. Ct. 84, C.D. 4741, 451 F. Supp. 973 (1978).

case on the issue of the bona fide buying agent since the 1979 implementation of the GATT Customs Valuation Code.[8] In *J.C. Penney* the court stated clearly the application of the presumption of correctness supporting the government's appraisal of dutiable value in cases determining the existence of a bona fide buying agent.[9] This presumption of correctness favoring the government's valuation normally would require an importer to prove, first, that the appraised values are erroneous, and second, that the importer's claimed values are correct.[10] However, as in *J.C. Penney,* since disputes involving the dutiability of commissions usually do not involve a dispute about the underlying valuation of the imported merchandise, the affected importer in these instances need only prove the nondutiable character of the alleged buying commission by a preponderance of the credible evidence.[11]

### B. Control of Principal over Agent

The primary consideration in establishing the existence of a bona fide buying agent is the right of the importer to control the agent's conduct with respect to the matters entrusted to the agent.[12] The CIT in *J.C. Penney* relied almost entirely on evidence of J.C. Penney's control over its agent in holding, first, that J.C. Penney had a bona fide buying agent,[13] and second, that Customs thus improperly included commission payments in the appraised value of the merchandise.[14] In so holding, the CIT pointed to J.C. Penney's active role in selecting merchandise, in selecting factories,[15] in forbidding its agent to place orders without instructions, in ensuring that the involved foreign seller was aware of J.C. Penney as the true buyer, in restricting its agent's discretion of activity to services typical of a buying agent,[16] and in instructing its agent with respect to settling claims for defective goods.[17] The court also briefly pointed to the lack of the agent's financial risk,[18] to the existence of written agency agreements,[19] and to the agent's receipt of its commission solely from J.C. Penney (its

8. The GATT (General Agreement on Tariffs and Trade) Valuation Code was implemented into U.S. law by title II of the Trade Agreements Act of 1979.

9. *J.C. Penney,* 80 Cust. Ct. at 94, 451 F. Supp. at 982.

10. However, for a case that has lessened the severity of this dual burden of proof allocation in Customs disputes, see Jarvis Clark Co. v. United States, 733 F.2d 873, 878 (Fed. Cir. 1984).

11. Globemaster Midwest, Inc. v. United States, 67 Cust. Ct. 539, 547, R.D. 11758, 337 F. Supp. 465, 471 (1971).

12. *J.C. Penney,* 80 Cust. Ct. at 95, 451 F. Supp. at 983.

13. *Id.*

14. *Id.*

15. *E.g.,* J.C. Penney actually visited the foreign factories and participated in negotiations, evidencing its capability of making direct purchases. 80 Cust. Ct. at 95–96, 451 F. Supp. at 983.

16. *E.g.,* J.C. Penney's agent compiled market information, gathered samples, assisted in factory negotiations, conducted translations, inspected the merchandise, placed purchase contracts, arranged for inland shipment, paid for merchandise, etc. 80 Cust. Ct. at 97, 451 F. Supp. at 984.

17. 80 Cust. Ct. at 101, 451 F. Supp. at 987.

18. 80 Cust. Ct. at 100, 451 F. Supp. at 986.

19. 80 Cust. Ct. at 98, 451 F. Supp. at 985.

principal), which the agent did not share with the foreign seller in any way.[20] *J.C. Penney's* thorough discussion of the importer's requisite attributes of control over its agent has made this case a landmark for determining the existence of a bona fide buying agency.

In the recent case of *Jay-Arr Slimwear, Inc. v. United States*[21] the importer lost its bid to have commissions excluded from dutiable value primarily because of the importer's lack of control over its agent. Here, the CIT described the distinction between a selling versus a buying agent as whether the involved expense of the agent to the importer was associated with selling or producing the merchandise, rather than some ministerial function in procuring the goods.[22] That is, if the expense of the agent was associated more with the nature of what was purchased than with the manner of purchase, the expense would be characterized as one of a selling agent, and thus would be added to dutiable value.

In holding that the commission payments were includable in dutiable value, the CIT found that although Jay-Arr Slimwear's agent's activities were more closely associated with the manner in which the goods were produced for export, rather than their nature, the capacity in which the agent functioned surpassed the permissible limit of supervisory duties.[23] Jay-Arr Slimwear's agent, for example, played a vital role in dealing with Haitian Customs, in expediting the delivery of goods to the assembly plant, and in curtailing the effects of Haitian government-imposed plant closings. Furthermore, Jay-Arr Slimwear left it to its agent to exercise essentially total discretion in deciding how best to eliminate impediments to the release and manufacture of the ordered goods. In addition to the CIT's finding of a discouragingly low degree of importer control over its agent, the court's opinion was also swayed by the agent's ownership in the foreign manufacturers and by the agent's endorsement of commission checks to those manufacturers as putative loans.[24] These endorsements smacked too much of indirect payments to the foreign manufacturers/sellers for the merchandise. Thus, Jay-Arr Slimwear was also apparently remiss in not controlling certain pertinent financial ties of its agent to the foreign manufacturers. Jay-Arr Slimwear simply did not have enough control of its agent's activities to claim the existence of a bona fide buying agency.

In the more recent case of *Pier 1 Imports, Inc. v. United States*,[25] Pier 1 Imports' seemingly pervasive control over its agent helped to overcome evidence of other negative factors, allowing the court to hold in favor of a bona fide buying agency. The negative factors were: (1) that the agent received rebates from the manufacturers in the People's Republic of China; (2) that the buying agency

20. 80 Cust. Ct. at 97, 451 F. Supp. at 984.
21. 681 F. Supp. 875 (Ct. Int'l Trade 1988).
22. *Id.* at 878.
23. *Id.* at 880.
24. *Id.* at 879.
25. 708 F. Supp. 351 (Ct. Int'l Trade 1989).

agreement called for the selection of shipping lines to be the exclusive prerogative of the agent and not of Pier 1 Imports; (3) that the agent seemed to purchase merchandise outright for its own account; and (4) that the transaction documents referred to the agent as the seller.

However, the CIT found: (1) with respect to the rebates, that they were routinely granted and inconsequential because they were never a part of the transaction between Pier 1 Imports and the sellers; (2) with respect to the selection of shipping lines, that Pier 1 Imports actually sent routing guidelines attached to purchase orders to state a preferred choice; (3) with respect to the appearance of outright purchases by the agent, that the agent only purchased merchandise outright when Pier 1 Imports ordered it and forwarded the funds necessary for acquisition; and (4) with respect to the transaction documents listing the agent as the seller, that it was necessary to look to the substance of the transaction to find, by clear and convincing evidence in the importer's favor, that the statements made at the time of entry were erroneous.[26]

In examining the transaction's substance, the CIT pointed to Pier 1 Imports' control of all aspects of the purchasing process.[27] Pier 1 Imports controlled the manner of payment, to allow no discretion on the part of its agent to deduct its commission, handling charges, and/or freight charges from a master letter of credit. Moreover, Pier 1 Imports required separate invoices from, and made separate payments to, its agent, thereby lending one more degree of control to ensure that indirect payments would not make their way to the foreign sellers. Finally, Pier 1 Imports demonstrated its option to purchase directly from the manufacturers.[28] The CIT found this evidence of control persuasive enough to hold for a bona fide buying agency, notwithstanding the contrary seller designation of the agent in the transaction documents.[29] The *Pier 1 Imports* case demonstrates that the substance of the transaction (the principal's de facto control over the agent), if clearly discernible, will be given far greater weight than the mere form of the transaction as represented in the transaction documents.

### C. Manner of Payment

19 U.S.C. § 1401a(b)(4)(A) (1988) provides that "[t]he term 'price actually paid or payable' means the total payment . . . made, or to be made, for imported merchandise *by the buyer to, or for the benefit of,* the seller." (Emphasis added.)

26. *Id.* at 356.

27. Pier 1 Imports selected the merchandise, travelled to the PRC with its agent to negotiate with the factories, determined quantity, negotiated the F.O.B. purchase price, and negotiated delivery from the PRC suppliers. *Id.* at 354.

28. *Id.* at 355. This is apparently the ultimate sign that the involved agent is an expendable intermediary, i.e., not engaged by the seller, which the importer has employed by choice.

29. *Id.* at 357.

In one case, *Moss Manufacturing Co. v. United States*,[30] despite all the attributes of control being present, the section 1401a language quoted above proved fatal to the importer who disbursed commission payments to the seller with directions to remit the monies to the importer's agent. Ironically, the CIT in this matter found that the involved intermediary was a bona fide buying agent (seemingly putting an end to the inquiry).[31] The CIT went further, however, finding that the importer must show that none of the commission inured to the benefit of the foreign manufacturer.[32]

Problematic for the importer, Moss Manufacturing, was that the letter of credit issued to the foreign manufacturer did not indicate the nature of the required payment to the agent, and the receipt acknowledging transfer of the commissions did not specify the source of the funds. Also, the commercial invoice failed to list separately the buying commission and other charges. The CIT held for the government, concluding that although the disbursement similarly benefitted the buyer, this did not detract from the benefit to the seller.[33] It is difficult even to surmise whether a better paper trail could have salvaged Moss Manufacturing's position, or whether buying-commission payments via the manufacturer should have been avoided altogether. One case, *Generra Sportswear Co. v. United States*,[34] dealing with the related issue of the dutiability of payments for import quota, suggests an answer. In this quota case Generra Sportswear had negotiated a fixed price for quota with the foreign manufacturer. The foreign manufacturer then obtained the quota from a third party, but actually paid more than the price that the foreign manufacturer and Generra Sportswear had negotiated. Nevertheless, Generra Sportswear only paid the foreign manufacturer the negotiated price (for the merchandise and the quota). The CIT apparently relied on the fact that the foreign manufacturer, in this instance, could not have received a benefit, since it actually sustained a loss in procuring the quota. The CIT also noted that the manufacturer did not make purchase "for imported merchandise" but, rather, made purchase "for quota."[35]

30. 714 F. Supp. 1223 (Ct. Int'l Trade 1989), *aff'd*, 896 F.2d 535 (Fed. Cir. 1990).

31. 714 F. Supp. at 1229.

32. *Id.*; *cf.* Monarch Luggage Co. v. United States, 715 F. Supp. 1115 (Ct. Int'l Trade 1989). During part of the agency relationship, the principal unsuccessfully attempted to have Customs deduct commissions already subsumed in the F.O.B. purchase price on invoices pursuant to a formula for making their payment: F.O.B. price divided by 0.96. When the principal began to exclude the commissions from F.O.B. price, by multiplying that accurately stated F.O.B. price by 0.04 and by paying for the commission separately, the court accepted this invoicing procedure for preserving the duty free character of the commissions. 715 F. Supp. at 1117. Hence, while buying agent commissions are excludable from dutiable value, they will not be deducted when already subsumed in the transaction price. Separate itemizing or invoicing of the commission is crucial.

33. *Moss Mfg.*, 714 F. Supp. at 1228.

34. 715 F. Supp. 1101 (Ct. Int'l Trade 1989), *rev'd*, 905 F.2d 377 (Fed. Cir. 1990).

35. 715 F. Supp. at 1102. In other words, the quota was presumably not a condition of the sale. The importer was apparently free to purchase the quota from an unrelated third party, with no

The Court of Appeals for the Federal Circuit reversed the CIT in *Generra Sportswear,* however, holding that since these quota payments were made to the seller, they were thus part of the 19 U.S.C. § 1401a(b)(4)(A) "total payment . . . made . . . *by the buyer to,* or for the benefit of, *the seller.*"[36] The Federal Circuit also noted that quota charges were not otherwise excluded under 19 U.S.C. § 1401a(b)(3).[37]

Likewise, since buying agent commissions are also not otherwise excluded under section 1401a(b)(3), the most prudent course of action, dictated by analogy to the *Gererra Sportswear* case, would be to pay buying agent commissions directly to the buying agent, accompanied by separate invoicing. Unfortunately, there are some banks that will undoubtedly refuse to finance the buying commissions directly, due to their small amounts. The only recourse in this somewhat unusual instance will be to set up a thorough paper trail and seek advance approval of the transaction from U.S. Customs through a prospective administrative ruling request. If approval is not forthcoming, an alternative request would be to ask that the involved bank open the letter of credit to the agent for both the agent commission and merchandise, with written and clear instructions to the agent to remit only the contract price payment to the foreign seller for the merchandise.

### D. Risk of Loss Allocation

The issue of risk of loss allocation is worthy of discussion for two reasons. First, given the zeal of the importer to protect itself from potential liability for the acts of its agent, the importer will frequently attempt to make the agent an independent contractor/seller even to the extent of forcing the agent to bear the risk of loss for damaged or defective merchandise, regardless of fault. As set forth below, the bona fide buying agent can only accept the risk of loss due to its own negligence. Second, there is the potential for the agent to want to expand and become more independent by buying on its own account, thereby serving a maximum number of importers for increased profit. Maintaining its own inventories, the intermediary agent bears a per se risk of loss and necessarily takes on the air of an independent seller, thereby losing the status of a bona fide buying agent.

While *J.C. Penney,* discussed above, was decided in favor of a bona fide buying agency primarily because of the principal's control, the CIT in that matter did point out approvingly that the agent had no insurable interest in the merchandise, bearing neither the risk of a price increase nor the risk of loss.[38] At least two other cases where the issue of risk of loss allocation played a decisive

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prejudice to its right to buy the merchandise from the manufacturer at the negotiated price for the merchandise.

36. *Generra Sportswear Co.,* 905 F.2d at 379 (emphasis added).

37. *Id.*

38. *J.C. Penney,* 80 Cust. Ct. at 100, 451 F. Supp. at 986.

role in determining whether a bona fide buying agent existed are *New Trends, Inc. v. United States*[39] and *Rosenthal-Netter, Inc. v. United States*.[40] In both of these cases, the CIT found the involved agents to be acting as independent sellers or contractors and held that their commissions had to be included in dutiable value.

In *New Trends* the involved agents bore the costs of shipping preparation, as well as the risk of loss for damaged, lost, or defective merchandise. The CIT intimated that because the importer left the manner of payment to the agents (making the letters of credit payable to the agents, from which the agents deducted their commission), the agents were not acting primarily for the benefit of New Trends, but for themselves as independent sellers or contractors.[41]

In *Rosenthal-Netter* the agent purchased up to ten times the amount ordered by the importer, revealing that the agent was buying for its own account. Presumably, if the agent could have matched the excess merchandise to specific orders placed by other importers, this would not have posed a problem. However, the agent bore the risk for defective merchandise that the agent had to recoup from the manufacturer. Also, the importer forced the agent to absorb the cost of shipping and handling, which regardless of the amount, the agent had to recoup from its flat ten percent commission. The importer also reserved the right to cancel orders outright, irrespective of the agent's procurement status. The CIT found that the transaction documents reflected passage of title to the agent and then to the importer, along with a pricing structure that allowed the agent to charge a markup in some instances.[42] To the CIT, this evidence showed that the agent operated an independent business, primarily for its own benefit.[43] In this instance, as in *New Trends*, the intermediary was found to be playing the role of an independent seller or contractor.

The case of *Pier 1 Imports*, discussed above, indicates the absolute permissible limit of risk allocation. *Pier 1 Imports* sanctioned the imposition of liability on the involved agent for matters uniquely attributable to the agent's own negligence.[44] The agent was not to be held liable for any short or erroneous shipments or for defective or damaged goods in situations where the goods had already been packed for shipment by the supplier without representatives of the agent being present during such packing. Furthermore, the agent was not responsible for damage to shipments in transit or for delays incurred by the shipping lines.

Thus, in addition to having the important requisite attributes of control and the proper manner of payment, one must avoid the undue allocation of risk upon the

39. 645 F. Supp. 957 (Ct. Int'l Trade 1986).
40. 679 F. Supp. 21 (Ct. Int'l Trade), *aff'd*, 861 F.2d 261 (Fed. Cir. 1988).
41. New Trends, 645 F. Supp. at 961.
42. Rosenthal-Netter, 679 F. Supp. at 25–26.
43. *Id.* at 25.
44. *Pier 1 Imports*, 708 F. Supp. at 357.

agent. Simply put, when an agent must bear undue risk normally borne by the seller or the importer, the court will view the agent as an undesired independent seller or contractor.

### E. Transaction Documents

As is to be expected, given the importance of the substance of a given transaction, no case yet has been decided primarily on the transaction documents alone. Nevertheless, the CIT routinely examines them as part of its analysis.[45] While the transaction documents do not play a decisive role in the CIT's determination, they are the easiest to dictate by all the concerned parties in the buying agent relationship. A written buying agency agreement provides ready evidence of the existence of a bona fide buying agent relationship and should always be recommended to the serious importer.[46] The agreement should reflect the elements of control, proper manner of payment, and permissible allocation of risk as discussed above. Often, assuming the substance of the involved transactions is not wholly inconsistent with the terms of the written agreement, the existence of a written buying agency agreement will dissuade the U.S. Customs Service from challenging the exclusion of buying commissions from dutiable value. All transaction documents should avoid referencing the agent as the seller, and where possible, reference instead the true seller.[47]

## III. Conclusion

From the perspective of the CIT, the most crucial issue in determining the existence of a bona fide buying agency relationship between the importer and its agent is the substance of their transactions. Graphically, the importer must have the requisite amount of control over its agent, such that the agent can be identified more with the importer than with the seller.[48] One means to this end, which is easy for all parties concerned to control, is the execution of a written buying agency agreement between importer and agent. While the existence of such an

45. *See generally J.C. Penney,* 80 Cust.Ct. at 98, 451 F. Supp. at 985; *Rosenthal-Netter,* 679 F. Supp. at 23.

46. *See* Oriental Exporters, Inc. v. United States, 4 Ct. Int'l Trade 1 (1982) (a preexisting buying agency agreement covering merchandise manufactured in Hong Kong and Japan was effectually extended by the court to cover Taiwan in its finding of a bona fide buying agency respecting purchasing activities in Taiwan).

47. *See* Globemaster Midwest, Inc. v. United States, 67 Cust. Ct. 539, 545, R.D. 11758, 337 F. Supp. 465, 470 (1971) (where the transaction documents refer to the alleged buying agent as the seller, the reference cannot be repudiated absent clear and convincing evidence that it was erroneous). *See also Pier 1 Imports,* 708 F. Supp. at 351.

48. Depending on the attributes of control the importer exercises over the agent, even the competing control of the seller, i.e., by having the agent in its export division, may not prove fatal to the status of the agency as a bona fide buying agent. *See* Bushnell Int'l, Inc. v. United States, 60 C.C.P.A. 157, C.A.D. 1104, 477 F.2d 1402 (1973).

agreement is not dispositive of the issue, it can dissuade the U.S. Customs Service from challenging the bona fides of the buying agency relationship.

The CIT has created two general pitfalls to preserving the nondutiable character of buying agent commissions: the manner of payment and the risk of loss allocation. The payment for commissions, pending further case law development, should be made directly to the agent separately from the payment to the seller for the merchandise and via separate itemizing or invoicing. The only risk of loss allocation on the agent should be liability for matters attributable to the agent's own negligence.

As even a brief review of the recent cases on the bona fides of a given buying agent relationship illustrates, each case has its own set of complex facts. Lawyers representing importers should endeavor to discover the substance of a given agency relationship and should be wary of the signs of trouble. The preservation of nondutiable character is always much more manageable at the conception of a series of transactions than when the U.S. Customs Service has intervened, down the road, with the threat of years-long accumulated liability. Indeed, the only real measure of predictability of legal consequences in this area may be attained through a prospective administrative request to the U.S. Customs Service regarding the proposed transaction.[49] Even so, the efficacy of such an administrative request will depend on a prior cost-benefit analysis to justify making the request, and then on the factual completeness and accuracy, as well as on the adeptness of legal analysis, in the request.

49. *See* 19 C.F.R. pt. 177 (1989).